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October 24, 2006

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**VIA E-FILING & HAND DELIVERY**

Mr. Charles L.A. Terreni  
Chief Clerk/Administrator  
**South Carolina Public Service Commission**  
101 Executive Center Dr., Suite 100  
Columbia, SC 29210

Re: Application of Carolina Water Service, Incorporated for Adjustment of  
Rates and Charges for the Provision of Water and Sewer Service  
**Docket No. 2006-92-WS**

Enclosed for filing please find the original and one (1) copy of the Office of Regulatory Staff's Petition for Reconsideration or Rehearing in the above referenced docket.

Please note that the attached documents are exact duplicates, with the exception of the form of the signature, of the e-filed copy submitted to the Commission in accordance with its electronic filing instructions.

Please date stamp the one extra copy for our office and return it to me via our courier.

Do not hesitate to let me know if you have any questions.

Sincerely,

Nanette S. Edwards

NSE/pjm  
Enclosures

cc: John M.S. Hoefer, Esquire

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2006-92-WS**  
**October 24, 2006**

<b>In Re:</b>	)	
	)	
<b>Application of Carolina Water Service, Inc. for Adjustment of Rates and Charges for the Provision of Water and Sewer Service.</b>	)	<b>Petition for Reconsideration or Rehearing of Order No. 2006-543</b>
_____	)	

The South Carolina Office of Regulatory Staff (“ORS”) respectfully submits its Petition for Reconsideration or Rehearing in the above-captioned matter pursuant to 2006 S.C. Acts No. 387, § 38 (amending S.C. Code Ann. § 58-5-330 (1976)), and 26 S.C. Code Regs. 103-836 (1976) and 103-881 (Supp. 2005). ORS petitions the Public Service Commission of South Carolina (“Commission”) to reconsider Order No. 2006-543, issued October 2, 2006. In support of its Petition, ORS would show the following:

1. ORS is a formal party of record in this docket.
2. On August 30, 2006, the parties of record submitted a Settlement Agreement which proposed net revenues 50.51% less than Carolina Water Service, Inc. (“CWS” or the “Company”) requested in its Application.<sup>1</sup>
3. On October 2, 2006, the Commission issued Order No. 2006-543, Order Rejecting Settlement and Denying Application for an Increase in Rates and Charges (“Order”).
4. ORS received Order No. 2006-543 (“Order”) on October 5, 2006.

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<sup>1</sup> See page 2 of Exhibit A (stipulated testimony of Sharon G. Scott) to the Settlement Agreement.

5. In Order No. 2006-543 the Commission rejected the Settlement Agreement entered into and proposed by the only two parties of record in this matter.

6. In accordance with 2006 S.C. Acts No. 387 § 38 (amending S.C. Code Ann. § 58-5-330 (1976)), and the Commission's Rules of Practice and Procedure, 26 S.C. Code Regs. 103-836 (1976) and 103-881 (Supp. 2005), ORS respectfully petitions the Commission for reconsideration of the following findings of facts, conclusions of law and decisions made by the Commission.

7. Each finding, inference, conclusion or decision cited in this Petition constitutes error, arbitrary and capricious action, or is clearly erroneous in view of the reliable, probative and substantive evidence on the whole record or is an abuse of discretion all of which results in prejudice to the substantial rights of ORS. In addition, Order No. 2006-543 contains errors that are unsupported by substantial evidence, that are made upon unlawful procedure, or that violate constitutional or statutory provisions.

#### **I. The Commission Exceeded Its Authority**

8. The Commission exceeded its authority in that:

(a) The Commission propounded written questions. By its Directive dated June 27, 2006, (hereinafter referred to as "Request for Information"), the Commission requested CWS to supplement its application and furnish specific information to the Commission.<sup>2</sup> While the Commission's July 12, 2006 Directive, issued in response to the request for reconsideration of the Request for Information, states that "the Commission has not *ordered* [CWS] to compile any information," Order 2006-543

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<sup>2</sup> Copy of Directive attached as Attachment A. Directive memorialized in Order No. 2006-407, dated July 25, 2006.

ultimately rejects the Settlement Agreement for failure to provide the information sought by the Commission.<sup>3</sup> The Commission exceeded its statutory authority by issuing the Request for Information. Such a request is tantamount to conducting an inspection, audit, inquiry, investigation or examination of the Company. Prior to 2004 S.C. Acts 175, enacted July 1, 2004, the Commission was authorized to some extent to perform those functions. Act 175, however, enabled ORS, and relieved the Commission, of the authority to inspect, audit, investigate and examine those utilities within the jurisdiction of the Commission.<sup>4</sup> Further, the Commission's authority to institute an inquiry on its own motion was expressly repealed by 2006 S.C. Acts 318.<sup>5</sup> Pursuant to S.C. Code Ann. § 58-4-55 (Supp. 2005), ORS has the investigatory, examination and auditing powers and duties. By authorizing ORS to conduct inspections, examinations and investigations, the legislature excluded the Commission from doing so. "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' The maxim should be used to accomplish legislative intent, not defeat it."<sup>6</sup> The authority of the Commission to propound interrogatories or questions was expressly repealed.<sup>7</sup> "...[W]e must presume the legislature did not intend a futile act when construing a

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<sup>3</sup> Order at p. 20-24.

<sup>4</sup> See S.C. Code Ann. § 58-4-50(A)(2) and § 58-3-200 (Supp. 2005).

<sup>5</sup> See 2006 S.C. Code Act No. 318 of 2006 expressly repealing §58-5-280.

<sup>6</sup> State v. Leopard, 349 S.C. 467, 473, 563 S.E.2d 342 (Ct. App. 2002).

<sup>7</sup> S.C. Code Ann § 58-3-190 and § 58-3-200 were amended by 2004 S.C. Acts 175 such that the Commission no longer has the authority to propound "questions and interrogatories."

statutory amendment.”<sup>8</sup> When a statute has been changed, by adding or deleting a provision, term or word, it must be presumed that it was done so with legislative intent.<sup>9</sup>

(b) The Commission exceeded its authority by acting as a party when it issued the Request for Information. The Commission is precluded from participating in a rate case as a party of record. S.C. Code Ann. § 58-3-60(A) (Supp. 2005). (“The commission staff shall not appear as a party in commission proceedings and shall not offer testimony on issues before the commission.”)

(c) The Commission is subject to the Code of Judicial Conduct pursuant to S.C. Code Ann. § 58-3-30 (Supp. 2005). The Commission violated Rule 501 of the South Carolina Appellate Court Rules (SCACR), Canon 3 in that the Commission was attempting to independently investigate facts by propounding written questions, holding hearings seeking “public opinion,” and calling a rebuttal witness. (*Infra* p.4-6).

(d) The Commission stated that the Request for Information was not a discovery request but simply a request that the Company “supplement” its application with additional information.<sup>10</sup> However, the Commission did not reject the Company’s application at the time of the filing on March 27, 2006, on the basis that the application was incomplete.<sup>11</sup>

(e) The Commission called a rebuttal witness to testify. On June 12, 2006, at the Lake Wylie night hearing, Mr. Don Long, a non-party public witness, testified. At the conclusion of his testimony, he was requested by a Commissioner, to

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<sup>8</sup> *State v. Leopard*, 349 S.C. 467, 472, 563 S.E.2d 342 (Ct. App. 2002) citing *State v. Knuckles*, 348 S.C. 593, 560 S.E.2d 426 (2002), citing *TNS Mills, Inc. v. S.C. Dept of Revenue*, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998).

<sup>9</sup> *Lark v. BiLo*, 276 S.C. 130, 134-135, 276 S.E.2d 304, 306 (1981).

<sup>10</sup> Order at p. 3.

<sup>11</sup> 26 S.C. Code Regs. 103-821 (B)(2).

present rebuttal testimony at the hearing later scheduled to be held on September 7 and 8, 2006 at the Commission's offices in Columbia, South Carolina. At the September 7<sup>th</sup> hearing, Mr. Long testified that his attendance and testimony was being offered pursuant to the request of the Commission.<sup>12</sup> It is inappropriate for the Commission to actively solicit potential evidence, in the form of testimony or otherwise, especially from a witness called by the Commission to rebut testimony of the parties. By its actions, the Commission exceeded its authority by participating in this matter as a party of record.<sup>13</sup>

(f) The Executive Director employed Dr. Woolridge to provide professional expertise to assist ORS in evaluating CWS's application, assisting ORS in preparation of its case, and to provide his services as an expert witness in this matter if necessary. Pursuant to agreement, the compensation and expenses of Dr. Woolridge are to be paid by CWS. The Commission exceeded its authority when it denied rate case expenses associated with the employment of expert witnesses and professional expertise. S.C. Code Ann. § 58-4-100 (Supp. 2005), provides that "[t]he compensation and expenses **must** be treated by the commission, for ratemaking purposes, in a manner generally consistent with its treatment of similar expenditures incurred by utilities in the presentation of their cases before the commission." (Emphasis added).

## **II. The Parties Were Not Afforded a Fair Hearing**

9. The Commission failed to afford the Parties a fair hearing in that the Commission sought discovery, failed to properly deliberate, shifted the burden of proof,

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<sup>12</sup> Transcript *Settlement Hearing*, Vol. I, Page 9, Lines 9-12.

<sup>13</sup> Transcript *Lake Wylie Hearing*, Vol. I, Page 22, Lines 15-23; Vol. II, Page 41, Lines 19-25.

raised issues not raised by parties of record, assumed the role of an advocate rather than an impartial panel.

(a) The arbitrary and capricious actions by the Commission denied the Parties a fair hearing in this matter. The Commission's request for additional information from the Parties, in essence issuing discovery, and the solicitation of a witness to testify violated the Parties rights. The Commission's attempt to act as a party in this matter prejudiced the proceedings, denied the Parties due process and precluded an impartial hearing.

(b) On June 12, 2006, a Commissioner requested that Mr. Long (the "witness") be allowed to "be in the hearing to answer questions or rebut any other information that was [presented]" at the hearing later scheduled to be held on September 7 and 8, 2006 at the Commission's offices in Columbia, South Carolina.<sup>14</sup> At the September 7<sup>th</sup> hearing, the witness testified that his attendance and testimony was being offered pursuant to the request of the Commission.<sup>15</sup> While counsel for CWS properly objected on the basis that the solicitation of a witness for a second opportunity to testify was outside of the Commission's established procedures and in violation of Rule 501 of the Judicial Code of Conduct, the Commission arbitrarily decided to vary from its "standard procedure" and failed to maintain its impartiality.<sup>16</sup> By its actions, the

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<sup>14</sup> Transcript, *Lake Wylie night hearing*, Vol. II, page 38-39, lines 13-20.

<sup>15</sup> "I gave testimony at that hearing and **at the request of the Chairman at that hearing, I'm here to provide some additional testimony** which will hopefully enhance the Commission's understanding or conclusions regarding the CWS Application." Transcript *Settlement Hearing*, Vol. I, Page 9, Lines 9-12. (Emphasis added).

<sup>16</sup> The Commissioner acknowledged that the instructions provided at the night hearings are that a person could only testify once: "We would normally say that the person cannot testify again..." Transcript, *Lake Wylie night hearing*, Vol. II, page 38 lines 16-20; Counsel for CWS objected on the basis that permitting Mr. Long to testify twice was contrary to the Commission's instructions and standard procedure and on the basis of Rule 501. The Chairman held that Mr. Long would be permitted to testify for a second time at

Commission participated in this matter as an advocate shedding its role as a fair and impartial panel.<sup>17</sup> The Commission acted in an arbitrary and capricious manner by failing to adhere to its own procedure of allowing public witnesses to testify only once.<sup>18</sup> By soliciting the witness to testify at the hearing held in Columbia, the Commission also violated Canon 3 of the Code of Judicial Conduct in that the Commission attempted to independently investigate facts in a case and solicited evidence to be presented. It is inappropriate for the Commission to actively solicit potential evidence, in the form of testimony or otherwise, from a witness.

(c) The Commission failed to properly deliberate and the Commission's actions illustrate that it acted with bias against the Parties. The Commission issued a notice on September 7<sup>th</sup> at approximately 8:35 a.m. regarding the 3:00 pm special Commission meeting on September 8<sup>th</sup> wherein the Commission denied the Settlement Agreement. The Commission issued its directive denying the Settlement Agreement on September 8, 2006, less than twenty-four hours after the close of the hearing on September 7, 2006 at 7:30 p.m.

(d) The Commission failed to provide a fair hearing conducted under dignified and orderly procedures as evidenced by the applause and laughter permitted during the hearing.<sup>19</sup>

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which time the court reporter noted [Applause]. Transcript, *Lake Wylie night hearing*, Vol. II, page 40 lines 1-19.

<sup>17</sup> S.C. Code Ann. § 58-3-60(A) (Supp. 2005).

<sup>18</sup> "If you speak at tonight's hearing, you will have one chance to speak tonight, but not at the hearing in Columbia. So, if for some reason you'd prefer to speak at the hearing that will be held in Columbia, there will be an opportunity for the public to speak in Columbia at the hearing, the conclusion of this docket, then you'll need to defer until that time." Transcript *Lake Wylie night hearing*, Vol. II, Page 7, Lines 9-15.

<sup>19</sup> S.C. Code Ann. § 58-3-225 (Supp. 2005). For example, at the Lake Wylie night hearing the court reporter noted [Applause] or [Laughter] at least fifty times during the hearing in a ninety-eight page transcript. Transcript *Lake Wylie night hearing*, Vol. II., page 12 line 9; p. 14 line 15; p. 21 line 23; p. 34, line 16; p. 35, line 7; p. 49, line 8; p. 51 line 9; p. 53, line 20; p. 56 lines 8, 13-16; p. 58 line 18; p. 61 lines



(e) The Commission voted to reject the Settlement Agreement because of “unresolved questions of fact and a lack of evidence presented by the Parties.”<sup>20</sup> The Commission states that one of the unresolved issues is whether CWS should have a uniform rate structure and the Commission’s right to inquire about the appropriateness of such a rate structure.<sup>21</sup> The Supreme Court of South Carolina held in the *August Kohn* case that “the burden is upon the **party** challenging uniformity and seeking allocation to show that the case so warrants.”<sup>22</sup> (Emphasis added). In the instant case, no party challenged the uniform rate structure and no party presented evidence that the uniform rate structure was inappropriate. Furthermore, in the past, the Commission has rejected challenges to CWS’s uniform rate structure.<sup>23</sup> The Commission cites *Hilton Head Inc. Plantation Utilities v. Public Service Commission of South Carolina* as support for its position that the Commission can deny an application for a rate increase based upon issues raised by a public witness and that the Commission has the “right of independent inquiry.”<sup>24</sup> The *Hilton Head* decision predates Act 175 and Act 318 and was issued at a time when the Commission was a party to the proceeding and was not subject to the Code of Judicial Conduct.<sup>25</sup> Act 175 subjects the Commission to the Judicial Code of Conduct, expressly provides that the Commission is no longer a party to the case, and expressly states that the Commission can no longer conduct inspections, audits and examinations.<sup>26</sup>

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15-21; p. 64 line 16; p. 65 line 12; p. 66 line 11; p. 67 line 10; p. 69 line 5; p. 72 line 18; p. 75 lines 6-9; p. 90 line 11. *See also*, Transcript *West Columbia night hearing*, Vol. I., pages 60-67.

<sup>20</sup> Order at p. 5.

<sup>21</sup> Order at p. 21.

<sup>22</sup> *August Kohn and Co., Inc. v. Public Service Commission of South Carolina*, 281 S.C. 28, 31, 313 S.E. 2d 630, 632 (1984) (Emphasis added).

<sup>23</sup> Order No. 2001-1009.

<sup>24</sup> Order at p. 17.

<sup>25</sup> S.C. Code Ann. § 58-3-200 (Supp. 2005) provides that the Commission cannot conduct inspections, audits and examinations.

<sup>26</sup> S.C. Code Ann. § 58-3-60(A); § 58-3-30(B); § 58-3-200.

Further, the Commission's authority to institute an inquiry on its own motion, which it had at the time of the *Hilton Head* decision, has been removed with the repeal of S.C. Code Ann. Section 58-5-280.<sup>27</sup> Act 175 established ORS as the agency responsible for investigating and auditing regulated utilities in South Carolina. ORS is responsible for representing the public interest before the Commission.<sup>28</sup> The Commission now has the responsibility of wearing the robe of an impartial judge and weighing the evidence admitted into the record to reach a decision.<sup>29</sup>

(f) The issue of whether to depart from CWS's proposed uniform rate structure was not an issue raised by either party.<sup>30</sup> The Company's application proposed rates in accordance with the rate structure approved in prior rates cases and most recently by the Commission in Order No. 2005-328. The Commission's action is indicative of its attempt to act as a party in this case.

(g) The issue regarding the flat fee structure for sewerage services was raised by the Commission. Again, this issue was not raised by any party, and the Commission provides no support for its contention that South Carolina determines whether a flat rate billing structure is just and reasonable on a "case by case" basis. The Commission has previously approved flat rate billing in previous CWS rate cases and most recently in Order No. 2005-328.<sup>31</sup> The Commission also points to its request for information regarding sewer backups based upon "questions raised at the Commission's

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<sup>27</sup> See 2006 S.C. Acts 318 which repealed S.C. Code Ann. Section 58-5-280.

<sup>28</sup> S.C. Code Ann. § 58-4-10 (Supp. 2005).

<sup>29</sup> Canon 3 of the Code of Judicial Conduct, Commentary: A judge must not independently investigate facts in a case and must consider only the evidence presented.

<sup>30</sup> Order at p. 2 and 21.

<sup>31</sup> The Commission approved flat rate billing for CWS affiliate Tega Cay in Order No. 2006-582.

public hearings” as the reason for denying the Settlement Agreement.<sup>32</sup> The Commission’s Order provides no specific information to support its finding.<sup>33</sup>

(h) Additionally, the Commission bases its rejection of the Settlement Agreement on: (1) unanswered questions exist with regard to Commission reporting requirements of DHEC violations; (2) allegations that not all sites were selected for testing; and (3) purported evidence that several systems were found to be unsatisfactory by DHEC.<sup>34</sup> In so finding, the Commission fails to account for the evidence submitted into the record by ORS through Ms. Hipp’s stipulated testimony wherein ORS found that CWS systems were operating adequately and in compliance with DHEC rules and regulations.<sup>35</sup> After conducting Business Office Compliance Reviews and site inspections, ORS found that service is adequate and CWS is in compliance with Commission and DHEC rules and regulations.<sup>36</sup> While not all sites are selected for testing there is no requirement upon ORS to test each site. ORS performed on-site inspections on 20 of 34 systems.<sup>37</sup>

(i) The Commission stated in its order that it was concerned with the quality of service issue and that the parties failed to supply sufficient information on this issue.<sup>38</sup> The Commission was supplied with sufficient information regarding quality of service and any DHEC violation that would require notice to the Commission. ORS received a total of 52 customer complaints during the test year out of a total of roughly

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<sup>32</sup> Order at p. 24-25.

<sup>33</sup> Porter v. South Carolina Public Service Commission of South Carolina, 333 S.C. 12, 507 S.E.2nd 328 at 332-333 (1998).

<sup>34</sup> Order at p. 29.

<sup>35</sup> Exhibit B of the Settlement Agreement (stipulated testimony of Dawn Hipp at pages 5-6).

<sup>36</sup> The notice of a RAD sample that exceeded the Maximum Contaminant Level does not constitute notice of a DHEC violation.

<sup>37</sup> See Exhibit B of the Settlement Agreement labeled Exhibit DMH-4.

<sup>38</sup> Order at p. 24 regarding sewer backups.

18,000 customers. As of April 1, 2006, CWS provides water service to 7,362 single family equivalents and wastewater services to 11,830 single family equivalents.<sup>39</sup> At the night hearings, approximately 15 customers complained about billing, service or quality issues.<sup>40</sup> In Dawn Hipp's pre-filed testimony attached to the Settlement Agreement, testimony was provided to resolve these issues.

CWS currently provides adequate water distribution And supply services to its residential and commercial customers...Safe drinking water standards were being met according to recent DHEC sanitary survey reports and required certified operator logs were in compliance at all ORS audited facilities. General housekeeping items including treatment chemical labeling, facility fencing, access roads and signage are satisfactory.<sup>41</sup>

CWS provides wastewater treatment under NPDES permits. During the ORS inspection, all wastewater collection and treatment systems were operating adequately and in accordance with DHEC rules and regulations.<sup>42</sup>

(j) Furthermore, on September 7, 2006, ORS filed a Supplement to the Settlement Agreement in which ORS informed the Commission that each customer witness who testified at a night hearing that he/she had a billing, service or quality issue which had not been resolved would be contacted by ORS's Consumer Services Department.<sup>43</sup>

(k) The Commission bases its rejection of the Settlement Agreement on the fact that it sought information explaining "how the Company's claimed rate case

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<sup>39</sup> Exhibit B of the Settlement Agreement, Exhibit DMH -3.

<sup>40</sup> This includes the fifth night hearing held in Columbia on September 7, 2006. This total does not include complaints based solely rates.

<sup>41</sup> Exhibit B of the Settlement Agreement (stipulated testimony of Dawn Hipp at page 5, Line 18 – page 6, Line5).

<sup>42</sup> Exhibit B of the Settlement Agreement, Testimony of Dawn Hipp at page 6, Lines 10-12.

<sup>43</sup> See Attachment B.

expenses were prudently incurred.”<sup>44</sup> No party challenged the rate case expenses and the utility’s expenses are presumed to be reasonable and incurred in good faith.<sup>45</sup> The Settlement Agreement allowed for rate case expenses in which the only two parties to the case agreed were reasonable. Therefore, rate case expenses were resolved by the Parties, the resolution of which was concluded to be in the public interest by ORS.

(l) Not only did the Commission ignore the evidence of record, but impermissibly and without statutory authority interjected itself into the proceedings as an advocate. The Commission is required to perform its duties in an impartial manner. See S.C. Code Ann. § 58-3-30(B) (Supp. 2005), Rule 501, SCACR, Canon 3. The Commissioners and the Commission’s employees are bound by the Code of Judicial Conduct as contained in Rule 501 of the South Carolina Appellate Court Rules. The Commission may not participate in a proceeding as a party. See S.C. Code Ann. § 58-3-60(A) (Supp. 2005).<sup>46</sup> Yet contrary to these statutory restrictions, the Commission undertook to raise issues and seek responses from the parties.<sup>47</sup>

(m) In the Order, the Commission cites *Kiawah Property Owners Group v. Public Service Comm’n of S.C.*, 359 S.C. 105, 597 S.E.2d 145 (2004) for the proposition that “the Commission may exercise its independent judgment in setting rates and is not limited to adopting or rejecting the testimony of witnesses as long as the

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<sup>44</sup> Order at p. 26.

<sup>45</sup> *Hamum v. South Carolina Public Service Commission*, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992).

<sup>46</sup> (“The commission staff shall not appear as a party in commission proceedings and shall not offer testimony on issues before the commission.”)

<sup>47</sup> See Order at p. 5, “Neither witness provided testimony concerning the unresolved issues of fact previously raised by the Commission related to this proceeding.” “Both witnesses testified that they had no knowledge or opinion as to any of the issues raised by the Commission ...”; p. 19, “...the Commission’s questions in this case, as posed in its directives of June 27, 2006... requested information that is pertinent to the Commission’s review of the proposed settlement as well as the Company’s application in this case.”; p. 20, “On June 27, 2006, the Commission requested financial data regarding the individual subsystems operated by CWS.”; p. 24 “As a result of questions raised at the Commission’s public hearings, the Commission posed in its directive of September 6 questions to the Company ...”

Commission's Order is based on the evidence of record."<sup>48</sup> *Kiawah Island* does not support the Commission's conclusion that the Commission may exercise its independent judgment. First, *Kiawah Island* involves a review of an operating margin not a return on equity or settlement agreement as in the instant case.<sup>49</sup> The operating margin in *Kiawah Island* was derived from Commission Staff and Company testimony contained in the record.<sup>50</sup> Here, the return on equity was agreed upon and set forth in the settlement agreement without any differing testimony in the record. Second, *Kiawah Island* predates Act 175 which prohibits Commission Staff from appearing before the Commission. Notwithstanding the predating of Act 175, *Kiawah Island* deals with the Commission deriving an operating margin from *testimony* presented by a party.<sup>51</sup> Contrary to *Kiawah Island*, the Commission here *sua sponte* independently sought additional evidence not in the record. ORS disagrees that *Kiawah Island* supports the Commission's assertion that it may exercise independent judgment. As such, the Commission's analysis suffers from an error of law.

(n) The Commission erroneously applies *Patton v. S.C. Public Service Comm'n*, 280 S.C. 288, 312 S.E.2d 257 (1984). The Commission states, "In *Patton*, the South Carolina Supreme Court affirmed the premise that quality of service is a "[necessary]" factor among other considerations in determining *a just and reasonable operating margin* when approving a rate increase."<sup>52</sup> (Emphasis added.) The Commission also states that *Patton* concludes that "substantial evidence in the record existed to

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<sup>48</sup> Order at p. 30.

<sup>49</sup> *Kiawah Island* at 108.

<sup>50</sup> *Id.* at 110. "We hold that the PSC's decision to set the Utility's operating margin at 6.5%-a number much less than what the PSC staff recommended-was supported in the record by the testimony of Clarkson and Ellison."

<sup>51</sup> *Id.*

<sup>52</sup> Order at p. 9.

support the Commission's concern regarding the company's quality of service."<sup>53</sup> To the contrary, *Patton* holds that quality of service rendered is a factor to be considered in fixing the 'just and reasonable' rates -- not an operating margin as the Commission holds.<sup>54</sup> In *Patton*, the Commission approved a rate increase for all customers with the exception that customers in a specific subdivision would not be charged the increase until the appellant completed upgrades to that subdivision to meet DHEC standards.<sup>55</sup> The decision in that case was supported by DHEC testimony.<sup>56</sup> In the instant case, there was no testimony from DHEC challenging the quality of service, no DHEC violation was cited in the Order, and the Company was not cited as being noncompliant with any DHEC standard. Unlike *Patton*, in this case the Commission has not found that CWS must make upgrades. As such, the Commission's analysis suffers from an error of law and Order No. 2006-543 is not supported by substantial evidence contained in the record of this case.

(o) By raising issues and propounding questions and directives for the parties, the Commission improperly advocated positions and denied the Parties a fair hearing.

### **III. The Order is Inconsistent With Commission Rulings**

10. The Order is inconsistent with Commission rulings.

(a) The Commission, pursuant to Order No. 2006-283 in this docket, approved the fees and expenses of an expert witness and professional expertise. The Commission found as follows:

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<sup>53</sup> *Id.* at 10.

<sup>54</sup> *Patton* at 293.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 292-293.

...we approve payment not to exceed \$17,500 for fees and \$830 for travel for the expert witness, amounts which we believe do not exceed compensation generally paid by the regulated industry for such specialists. CWS may propose inclusion of the actual amounts paid in its rate case expense submitted to this commission in the Company's rate case in Docket No. 2006-92-WS.<sup>57</sup>

The rate case expenses associated with Dr. Woolridge were included in the Settlement Agreement stipulated testimony of Sharon Scott.<sup>58</sup> By denying the Settlement Agreement and the company's Application, this Commission's Order is inconsistent with Order 2006-283.<sup>59</sup>

(b) The Commission, pursuant to Order No. 2006-284 in this docket, approved a Management Review Audit. Only after receiving the Commission's Order 2006-284 did ORS issue a Request for Proposal ("RFP"). Both CWS and ORS relied to their detriment upon Commission Order No. 2006-284 when issuing the RFP. Specifically, the Commission ordered that "the cost of the audit should be recoverable by each company in a proportionate share to each company's customer base and amortized in the same manner as rate case expenses for each of the three pending rate cases."<sup>60</sup> The rate case expense associated with the audit was set forth in the testimony of Sharon Scott.<sup>61</sup> By denying the Settlement Agreement and the company's Application, Order No. 2006-543 is inconsistent with Order 2006-284.<sup>62</sup>

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<sup>57</sup> Order No. 2006-283 at p. 2.

<sup>58</sup> Exhibit A of the Settlement Agreement (stipulated testimony of Sharon G. Scott at page 9). *See also*, Audit Exhibit SGS -4, note (L) (16) of Exhibit A. The rate case expenses are amortized over a three year period.

<sup>59</sup> *See Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992).

<sup>60</sup> Order No. 2006-284 at p. 5.

<sup>61</sup> Exhibit A of the Settlement Agreement (stipulated testimony of Sharon G. Scott at page 9). *See also*, Audit Exhibit SGS -4, note (L) (16). The rate case expenses are amortized over a three year period.

<sup>62</sup> *See Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992).



(c) Order 2006-543 is inconsistent with Order 2006-582. The Commission approved the same return on equity for Tega Cay, as that contained in the Settlement Agreement for CWS. The same testimony and evidence supporting a 9.4 % return on equity submitted in the Tega Cay case was submitted in this matter. The Commission's decision to approve a 9.4 % return on equity for Tega Cay but reject that same 9.4 % return on equity for CWS is arbitrary and capricious. Additionally, in Order-582 the Commission approved a flat rated sewer structure as producing fair and reasonable rates.

#### **IV. Commission Erred By Applying A Public Interest Standard**

11. The Commission erred when it applied a "public interest standard" to the Settlement Agreement. In rejecting the Settlement Agreement submitted by the parties, the Commission's findings, conclusions, and decision are: (1) in violation of statutory provisions; (2) are made in excess of the statutory authority of the agency; (3) are affected by other error of law; and (4) are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

(a) The Commission found that it "cannot make the necessary separate and independent determination as to whether or not the *public interest would be served* by acceptance of the Settlement Agreement..." Order No. 2006-543, p. 35, Finding of Fact and Conclusion of Law #13 (emphasis added). In reaching this Finding of Fact and Conclusion of Law, the Commission has exceeded its statutory authority and has erred as a matter of law.

(b) The South Carolina General Assembly has delegated to ORS the exclusive duty and responsibility to "represent the public interest in commission

proceedings.” S.C. Code Ann. § 58-4-50(4) (Supp. 2005). In delegating to ORS the exclusive responsibility to “represent the public interest of South Carolina before the commission,” the legislature has defined the term “public interest” to mean “a balancing of the ... (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer; (2) economic development and job attraction and retention in South Carolina; and (3) preservation of the financial integrity of the state’s public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.” S.C. Code Ann. § 58-4-10(B) (Supp. 2004). This definition appears only in Article 4 of Title 58 and applies only to ORS.

(c) By contrast, the Commission has no statutory authority to ascertain, represent, or determine the public interest in water or wastewater rate proceedings.<sup>63</sup> The Commission’s enabling legislation is devoid of any reference or directive instructing or empowering the Commission to ascertain, represent, or determine the public interest in water or wastewater cases. There is no statute in either Chapter 3 or Chapter 5 of Title 58 of the Code of Laws of South Carolina which authorizes the Commission to act in or make a determination regarding “the public interest.” Yet the Commission found and concluded in Order No. 2006-543 that it “cannot make the necessary separate and independent determination as to whether or not the public interest would be served by acceptance of the Settlement Agreement...” Order No. 2006-543, p. 35, Finding of Fact and Conclusion of Law #13. Such a finding of fact and conclusion of law is in excess of the Commission’s statutory authority and is an error of law. There is

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<sup>63</sup> Any court case holding that the Commission has public interest authority predates Act 175 wherein the General Assembly specifically delegated the public interest authority to ORS.

no statute which empowers the Commission to make a “separate and independent determination” as to whether approval of the Settlement Agreement would serve or be consistent with the public interest. The Commission possesses only the authority given it by the legislature.<sup>64</sup>

(d) The Commission’s finding and conclusion that it “cannot make the necessary separate and independent determination as to whether or not the public interest would be served by acceptance of the Settlement Agreement...” is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. No party of record to this case objected to the Settlement Agreement or asserted that the Settlement Agreement does not conform with the public interest as defined by statute. To the contrary, the parties of record, one of whom is the agency charged by statute with representing the public interest in matters before the Commission, concluded that the Settlement Agreement is consistent with the public interest. The Parties then proceeded to put forth evidence in support of the Settlement Agreement. For the Commission to ignore the evidence of record as presented by the parties of record is error.

#### **V. The Commission Erred By Not Approving the Settlement Agreement**

12. The Commission erred in not approving the Settlement Agreement. As set forth in this Petition, the Commission’s Order is in error because it is in violation of constitutional and statutory provisions; is in excess of statutory authority of the agency; is made upon unlawful procedure; is affected by other error of law; is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and is

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<sup>64</sup> S.C. Cable Television Ass’n v. Public Service Comm’n of South Carolina, 313 S.C. 48, 437 S.E.2d 38 (1993).

arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>65</sup>

#### **VI. The Order Fails to Make Findings of Fact and/or Conclusions of Law**

13. Order No. 2006-543 is not supported by substantial evidence and fails to comport with S.C. Code Ann. §1-23-350 (2005) in that the Order shows no finding of fact or substantial evidence.<sup>66</sup>

#### **VII. Other Matters in Error**

14. Order No. 2006-543 contains misstatements, errors, and/or factual inaccuracies.

(a) Page 6 of the Order fails to reference the Commission's August 23, 2006 Directive wherein the Commission ruled to receive public testimony on September 7, 2006 between the hours of 5:30 p.m. and 7:30 p.m. Specifically, ORS submits that the September 7, 2006 evening hearing to receive public testimony should be included as a fifth public hearing.

(b) Footnote 11 on page 14 of the Order, puts forth citations and statements regarding the standard of review state courts apply to Commission findings. Citations generally cite an authority or authorities to show support for a legal or factual proposition or argument as well as authority that provides background material that the reader might find useful in considering the proposition.<sup>67</sup> In the Order, footnote 11 is

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<sup>65</sup> S.C. Code Ann. § 1-23-380(5) as amended by 2006 S.C. Acts 387.

<sup>66</sup> Porter v. South Carolina Public Service Commission of South Carolina, 333 S.C. 12, 507 S.E.2nd 328 at 332-333 (1998).

<sup>67</sup> The Bluebook, A Uniform System of Citation, pgs. 4-5 (17<sup>th</sup> ed. 2000)

placed directly following the statement, “When the Commission believes that a public witness has additional information to contribute, the Commission is within the bounds of its discretion to allow such a witness to testify more than once.” Footnote 11 appears misplaced as it does not support the Commission’s proposition that it is within its bounds of discretion to allow a witness to testify more than once. Instead, footnote 11 describes the standard of review applied if the matter is appealed to state court.

(c) Page 15 of the Order references several Commission Directives and an Order preceding the statement, “The Commission *made clear that these issues had to be resolved* in the course of its consideration of the case.” (Emphasis added.) The Directives and Order referenced do put forth issues, some in the form of questions from the Commission; contrary however to what the Commission now indicates, the responses to the issues and questions were not required. For instance, the June 27, 2006 Directive included a “request” that CWS supplement its Application; the July 12, 2006 Directive states CWS “is free to ignore the Commission’s request” and that “the Commission has not *ordered* [CWS] to compile any information;” the August 4, 2006 Order states, “CWS is requested, not ordered, to provide the information, and is free to respond as it deems appropriate;” the September 6, 2006 was issued as a “request;” and, lastly, the September 20, 2006 Directive continues the permissive language by stating, “The issues which the Commission sought to address in its previous requests....” ORS respectfully disagrees with the Commission’s assertion that it made clear the issues *had* to be resolved or the Commission would reject the Settlement Agreement.

(d) In keeping with the paragraph above, the Order also states on page 15 that the “parties were either unable or unwilling to address” the issues to the

Commission's satisfaction." Page 16 of the Order states in reference to the "requests" that "the Parties have failed to provide" evidence. Page 18 states, "the Parties consciously chose not to respond to the Commission's inquiries...." Footnote 12 on page 18 states, "the Parties simply chose not to provide the requisite evidence necessary," and "the Parties chose to ignore the directives of this Commission to provide additional information." Further, page 21 states, "The Parties have sought to foreclose this inquiry altogether by withholding information...." As a party, ORS disputes these assertions that it was unwilling to address issues, failed to provide evidence, consciously chose not to provide information and ignored directives. The Commission, through its directives and orders, repeatedly characterized its demands as requests. Yet, the decision reached in Order No. 2006-543 and the attendant discussion contained therein, clearly show that the "requests" from the Commission were not requests but mandates for information. The failure to respond to these mandates was fatal to a fair consideration of the record presented to support the Settlement Agreement. Further, notwithstanding that it is the exclusive right of ORS to determine what evidence and witnesses to offer in a case<sup>68</sup>, ORS provided all information it had available. Specifically, during the September 7, 2006 10:30 a.m. hearing and in reference to requests made by York County Legislative Delegation which are similar to those made by the Commission, counsel for ORS stated that "[ORS] provided every piece that we had available to provide" and that "there was no attempt to withhold anything." <sup>69</sup>

(e) The Commission also cites class action rules of civil procedure in support of the Commission's proposition that it has a separate and independent obligation to

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<sup>68</sup> See S.C. Code Ann. §58-4-20(B), (Supp. 2005).

<sup>69</sup> Transcript *Settlement Hearing* page 57, lines. 23-29 and page 58, line 1.

review settlement agreements.<sup>70</sup> This is a novel assertion as class action procedures are specific and narrowly tailored to just what they were created to apply to – class actions. Nowhere in the Commission’s rules or regulations are any procedures akin to those in a class action. For instance, for a class action to proceed, a court must first certify a class. This is wholly unlike a proceeding before the Commission, and it is error for the Commission to apply inapplicable rules to support its proposition. ORS submits that it is charged with representing the public interest and that such public interest was adequately represented and protected by ORS. ORS believes that the Commission’s assertion of using class action rules to support its proposition that it has a separate and independent obligation to protect the public interest is error.

(f). The Order contains inadvertent errors as enumerated and set forth in this paragraph. Page 4 of the Order states the Parties submitted the prefiled written direct testimonies of Company witnesses Steven M. Lubertozzi and Bruce Haas. The Order omits that the rebuttal testimonies of Messrs. Lubertozzi and Haas were also submitted.

WHEREFORE, having set forth the proper grounds, ORS requests that the Commission issue an order:

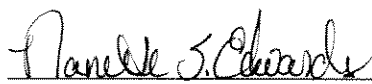
- A. Granting this Petition for rehearing or reconsideration and approving the Settlement Agreement;
- B. Revising Order No. 2006-543 to be consistent with Orders 2006-284 and 2006-283 and consistent with S.C. Code Ann. § 58-4-100 (Supp. 2005); and
- C. Granting such other relief as is just and proper.

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<sup>70</sup> See footnote 19 on page 31 of the Order.

Dated this 24<sup>th</sup> day of October, 2006.

**Office of Regulatory Staff**



Nanette S. Edwards, Esquire

C. Lessie Hammonds, Esquire

Shannon Bowyer Hudson, Esquire

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## ATTACHMENT A

**COMMISSION DIRECTIVE**

ADMINISTRATIVE MATTERS	<input type="checkbox"/>	DATE	<u>June 27, 2006</u>
MOTOR CARRIER MATTERS	<input type="checkbox"/>	DOCKET NO.	<u>2006-92-WS</u>
UTILITIES MATTERS	<input checked="" type="checkbox"/>		

**SUBJECT:**

DOCKET NO. 2006-92-WS - Application of Carolina Water Service, Incorporated (CWS) for Adjustment of Rates and Charges for the Provision of Water and Sewer Service - Discuss with the Commission a Motion to Modify the Remaining Testimony Pre-Filing Dates and Hearing Date filed by John M.S. Hoefer, Esquire, on behalf of the Applicant and other related matters.

**COMMISSION ACTION:**

The applicant has moved for a new scheduling order in this case due to the imminent transfer of certain of its assets in Kings Grant and Teal on Ashley to Dorchester County. When finalized, this transfer will necessarily affect some of the financial information which Carolina Water Service, Inc. must submit in support of its application. Carolina Water Service will need to amend its application and its direct testimony to reflect this change in circumstances, and the Office of Regulatory Staff will need additional time to file its responsive testimony.

Therefore, I move that the Commission grant Carolina Water Service's request for a new hearing date and a new timetable for the pre-hearing schedule, and that the Commission direct the staff to devise an appropriate schedule, and the Company to send a new notice of hearing to its customers.

Mr. Chairman, it also occurs to me that the new schedule gives us an opportunity to obtain some information that I believe will be useful to the Commission in the course of this case. With its application, Carolina Water Service has provided us with aggregate financial information for the whole company. Yet, we have heard numerous witnesses in our public hearings express the desire for information regarding the individual systems which serve them. I share their desire for this type of information, and I believe that it would be useful to the Commission, the Office of Regulatory Staff, and the public in considering the Company's request for a rate increase.

Therefore, I also move that the Commission request that Carolina Water Service supplement its application to:

1. Provide a listing of each subdivision served by Carolina Water Service. by subdivision name and number, for each subdivision listed provide the individual system(s) by name and number that serves such subdivision, and the services provided to each subdivision.
2. Provide by each of the individual systems owned and operated by Carolina Water Service by system name and number the operating revenue, operating expenses, net income and rate base components in the identical format and detail contained on Schedule B and Schedule C of the Company's application, the totals of which must equal the water, sewer and combined operations of Carolina Water Service included on Schedule B, pages 1 through 3 and Schedule C, pages 1 through 3 of the Company's application.
3. Provide by subdivision name and number, customer type (water or sewer), and customer class (residential, commercial, etc.) the number of customers at the beginning of the test year and at the end of the test year, the total of which must equal the amounts contained on schedule F of the company's application.
4. Provide by subdivision name and number the dollar amount of pass through charges for each type of customer (water, sewer, etc.) contained on an average customer's monthly bill. Pass through charges are charges for water purchased from a government body or agency, or other entity

and/or sewer treatment charges where treatment services are provided by a government body or agency, or other entity. Also, identify the source of such charges by subdivision name and number.

5. Provide by subdivision name and number the rate charged by any government body or agency or other entity for purchased water and /or purchased sewer treatment.
6. Provide by individual system name and number, the expenditures for infrastructure improvement for the past five (5) years and the projected infrastructure expenditures for the next five (5) years.

PRESIDING	<u>Mitchell</u>					
	MOTION	YES	NO	OTHER	APPROVED	<input type="checkbox"/>
					APPROVED STC 30 DAYS	<input type="checkbox"/>
CLYBURN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		ACCEPTED FOR FILING	<input type="checkbox"/>
FLEMING	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	Absent	DENIED	<input type="checkbox"/>
HAMILTON	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>		AMENDED	<input type="checkbox"/>
HOWARD	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		TRANSFERRED	<input type="checkbox"/>
MITCHELL	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		SUSPENDED	<input type="checkbox"/>
MOSELEY	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		CANCELED	<input type="checkbox"/>
WRIGHT	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>		SET FOR HEARING	<input type="checkbox"/>
					ADVISED	<input type="checkbox"/>
Session: Regular					CARRIED OVER	<input type="checkbox"/>
Time of Session	<u>2:30 PM</u>				RECORDED BY	<u>JBS</u>

Commissioner Fleming was on Annual Leave

## **ATTACHMENT B**

C. DUKES SCOTT  
EXECUTIVE DIRECTOR

P.O. Box 11649  
Columbia, S.C. 29211



Phone: (803) 737-0800  
Fax: (803) 737-0801

DAN FARNETT  
CHIEF OF STAFF

181726

September 7, 2006

The Honorable G. O'Neal Hamilton  
Chairman, Public Service Commission of South Carolina  
P. O. Drawer 11649  
Columbia, South Carolina 29211

RECEIVED  
2006 SEP -7 AM 10:09  
SC PUBLIC SERVICE  
COMMISSION

Re: Docket No. 2006-92-WS: Application of Carolina Water Service, Inc.  
for Adjustment of Rates and Charges for the Provision of Water and Sewer  
Service

Dear Chairman Hamilton:

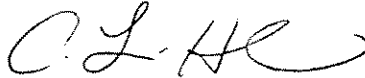
The purpose of this letter is to address issues raised at the night hearings by Carolina Water Service, Inc. ("CWS") customers and to supplement the parties' Settlement Agreement with respect to same.

ORS has a representative of our Consumer Services Department at each night hearing. Also, it is the policy of ORS to contact, either orally or in writing, each customer witness who testifies that he or she has a billing, service or quality issue which has not been resolved. ORS has followed its policy in this docket. ORS also advises customers of their right to file a formal complaint with the Commission.

A total of forty-one CWS customers testified at the four night hearings held in this docket in Lexington and York counties. (CWS has 7,431 water customers and 11,973 sewer customers.) Twenty-seven of those customers voiced opposition or concerns solely regarding the proposed rate increase. Fourteen of the forty-one customers addressed billing, service or quality issues in their testimonies.

The parties have agreed to file this letter with the Commission as a supplement to their Settlement Agreement on file in this Docket and ask that the Commission accept it as such. We appreciate the opportunity to bring these matters to the attention of the Commission.

Respectfully submitted,



C. Lessie Hammonds  
Shannon B. Hudson  
Attorneys for ORS

AGREED TO ON BEHALF OF APPLICANT



John M.S. Hoefer, Esquire  
Counsel for Carolina Water Service, Inc.

cc: Vice Chairman C. Robert Moseley  
Commissioner John E. Howard  
Commissioner David A. Wright  
Commissioner Randy Mitchell  
Commissioner Elizabeth B. Fleming  
Commissioner Mignon L. Clyburn  
Charles L. A. Terreni, Esquire

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2006-92-WS**


IN RE:

Application of Carolina Water Service, Inc. )  
For Adjustment of Rates and Charges for )  
The Provision of Water and Sewer Services )

**CERTIFICATE OF  
SERVICE**

This is to certify that I, Pamela J. McMullan, an employee with the Office of Regulatory Staff, have this date served one (1) copy of the **PETITION FOR RECONSIDERATION OR REHEARING** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

**John M.S. Hoefer, Esquire**  
Willoughby & Hoefer, P.A.  
PO Box 8416  
Columbia, SC 29202-8416

  
\_\_\_\_\_  
Pamela J. McMullan

October 24, 2006  
Columbia, South Carolina